No. 13548

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANDARD PAPER BOX CORPORATION and DONALD C. RUSSELL,

Plaintiff-Appellants,

vs.

CHARLES RUBLE, SR., CHARLES RUBLE, JR., R. T. MILLER, FRANK W. CLARK, JR., GEORGE P. RICHARDSON and ASSOCIATED PAPER BOX COMPANY,

Defendant-Appellees.

APPELLEES' REPLY BRIEF.

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APPELLEES' REPLY BRIEF.

I.

Introduction.

This is a minority stockholder's derivative suit presented in the name of the corporation, Standard Paper Box Corporation, and one stockholder and director, Donald C. Russell. The United States District Court, Honorable Peirson M. Hall, dismissed the complaint for want of jurisdiction. This appeal is from that judgment of Dismissal.

II.

Statement of Jurisdiction.

The complaint (Paragraph I) alleged that Standard Paper Box Corporation (hereinafter referred to as Standard), is a Delaware Corporation doing business in California [Tr. p. 3]; Paragraph III of the complaint [Tr. p. 5] alleged that plaintiff Donald C. Russell "is a resident of the City and County of Los Angeles, State of California"; Paragraph IV of the complaint [Tr. p. 5] alleged that the defendant Associated Paper Box Company (hereinafter called Associated), is a Washington corporation; Paragraph V of the complaint [Tr. p. 5] alleged that the defendants Charles Ruble, Sr., Charles Ruble, Jr., and R. T. Miller "are residents of the County of Los Angeles and of the State of California" (referred to in the complaint as the Ruble family); Paragraph VI of the complaint [Tr. p. 6] referring to the defendants Frank W. Clark, Jr., and George P. Richardson alleged "said defendants are residents of the County of Los Angeles, State of California." Paragraph VII of the complaint [Tr. p. 7] alleged "this court has jurisdiction of the cause by reason of the complete diversity of citizenship of Plaintiffs and Defendants."

There was in fact, according to the allegations of the complaint, *no* complete diversity of citizenship of plaintiff*s* and defendants and the United States District Court had *no* jurisdiction of the alleged cause of action.

III.

Statement of the Pleadings.

In addition to the foregoing allegations of the complaint the following allegations are pertinent:

(a) Paragraph I [Tr. p. 4] alleged that the stock of Standard consisted of 8,254 shares of 5% preferred and 9,486 shares of common.

(b) Paragraph II [Tr. p. 4] alleged that plaintiff, Donald Russell, owned 506 shares of common, his father, John A. Russell, owned 255 shares of common, his mother, Lillian Russell owned 573 shares of common, his brother owned 200 shares of common and the defendants Charles Ruble, Sr., Charles Ruble, Jr., and R. T. Miller owned approximately 6,324 shares of common.

(c) Paragraph V [Tr. p. 5] alleged that defendants Charles Ruble, Sr., Charles Ruble, Jr., and R. T. Miller were and are officers and directors of Standard and that the defendants Frank W. Clark, Jr. and George P. Richardson are directors of Standard. Paragraph III [Tr. p. 5] alleged that Plaintiff Donald C. Russell is a director of Standard and renders legal services to Standard.

(d) Paragraph XIII [Tr. p. 16] alleged that on April 25, 1952, John A. Russell (father of plaintiff Donald C. Russell) filed an action, No. 14042 in the United States District Court, Southern District of California, Central Division, against the "Ruble family" Standard and Associated and that Plaintiffs "at

the proper time will move to consolidate the within action with said civil action." (This is the "other" action referred to in oral argument June 2, 1952.) [Tr. p. 38.]

(e) Paragraph XVI [Tr. p. 18] alleged "that plaintiff Standard is under the domination and control of defendant Ruble Family through a dummy board of directors."

(f) Paragraph XX [Tr. p. 19] alleged "that it has been necessary to bring this action in order to preserve the rights of all of the shareholders of Standard."

(g) Throughout the complaint (except in so far as the paragraphs identifying the parties are concerned) plaintiff Donald C. Russell and plaintiff Standard are referred to collectively in the plural as "plaintiff*s*."

(h) The complaint generally complained of acts of alleged mismanagement by the majority stockholders allegedly in disregard of the rights of minority stockholders and was typical of a complaint by a minority stockholder asserting a derivative action.

Two motions were made in response to this complaint [Tr. p. 23]:

(1) Defendants Charles Ruble, Sr., Charles Ruble, Jr., R. T. Miller, Frank W. Clark, Jr., George P. Richardson and Associated moved to dismiss the complaint for want of jurisdiction.

(2) Standard moved to dismiss the complaint as filed on behalf of Standard and for an order withdrawing the name of Standard as a purported plaintiff on the ground "that said action was filed purporting to name said corporation as plaintiff without its knowledge, authorization or consent."

The United States District Court granted the motion to dismiss for want of jurisdiction stating that this "makes it unnecessary to pass on motion of Standard Paper Box Corporation to dismiss and to withdraw its name as a purported plaintiff." [Tr. p. 33.]

IV.
Issue on Appeal.

The instant case presents the following issue on appeal:

Does the United States District Court have jurisdiction of a minority stockholder's derivative action on the ground of diversity of citizenship where it affirmatively appears on the face of the complaint that the plaintiff minority stockholder and all of the individual defendants are citizens of the State of California?

V.
Summary of Argument.

The United States District Court has no jurisdiction of a minority stockholder's derivative suit on the basis of diversity of citizenship where the plaintiff minority stockholder and all individual defendants are citizens of the State of California.

VI.

Argument.

It should be noted preliminarily that the complaint does not allege the citizenship of *any* of the parties. It alleges only the "residence" of the parties which of course is not sufficient. (See cases collected Note 704, page 541, Section 1332, Title 28, U. S. C. A.) However, the trial court and all parties treated the allegation of "residence" as synonymous with "citizenship."

A.

There Is No Diversity.

The appellant herein seeks to avoid the inevitable conclusion that the United States District Court has no jurisdiction on the basis of diversity of citizenship of a minority stockholder's derivative suit where the plaintiff minority stockholder and all individual defendants are citizens of the same state by adding the name of the corporation Standard, a Delaware corporation, as plaintiff without its knowledge, authorization or consent and then arguing that the plaintiff minority stockholder is not an indispensable but a mere nominal party. It is apparent that but for the illegal naming of Standard as a plaintiff without its knowledge, authorization or consent, plaintiff Donald C. Russell would have been the sole plaintiff in the action. The assertion of Standard that it was named plaintiff without its knowledge, authorization or consent finds suppport in the allegation of the complaint wherein it is alleged "that plaintiff Standard is under the domination and control of defendant Ruble Family through a dummy board of directors." [Par. XVI, Tr. p. 18.]

Appellee regards it as very presumptive, to say the least, for one out of five directors who is a very minor stockholder to file an action in the name of a corporation without the knowledge, authorization or consent of any of the other board members or the officers of the corporation. The proper procedure would have been to join the corporation as a defendant as plaintiff's father John Russell did in Action No. 14042. [Par. XIII, Tr. p. 16.] This is a problem, however, which the trial court considered moot upon its dismissal of the complaint for want of jurisdiction.

We believe that the case of *Tucker v. New Orleans Laundries* (E. D. La., 1949), 90 Fed. Supp. 290, is decisive of this appeal. In the *Tucker* case Mrs. Tucker alleging that she was a minority stockholder of the defendant Crescent City Laundries, Inc., filed a derivative action based on alleged diversity of citizenship against various officers, directors and stockholders of Crescent alleging various acts of wrongdoing in the management of the corporation. Tucker was a citizen of Louisiana; Crescent was a Maine corporation; 45 of the 51 defendants were citizens of Louisiana and moved to dismiss for want of jurisdiction. Plaintiff apparently contended that Crescent, the Maine corporation, was the real and only indispensable plaintiff and should be realigned as plaintiff. The District Court granted the motion to dismiss for want of jurisdiction, saying at page 292:

> "Where as here jurisdiction is founded upon diversity of citizenship it is well settled that there is diversity of citizenship only when all the parties upon one side of the controversy are of different citizenship from all the parties on the other side. This, however, is not determined merely by the title to the

> action. If in any case the caption does not reflect the true relation of the parties to the controversy, they are realigned according to interest and the question whether diversity exists is determined after such realignment. *But in a stockholder's derivative action the corporation whose right is asserted is properly aligned as a defendant where, as is here alleged, it is in antagonistic hands.* Commencing with the leading case of Dodge v. Woolsey, 18 How. 331, 59 U. S. 331, 15 L. Ed. 401, and continuing throughout the years, *the courts have in this class of cases consistently refused to realign the corporate defendant in whose behalf plaintiff sues, as a party plaintiff."* (Emphasis ours.)

In the *Tucker* case plaintiff argued that under Section 1401 of the 1948 Judicial Code (28 U. S. C., Sec. 1401) she could sue in the United States District Court in Louisiana. The United States District Court considered this amendment and determined that it applied to venue only and not jurisdiction.

The *Tucker* case was affirmed on appeal by the United States Circuit Court of Appeals for the Fifth Circuit in 1951 (188 F. 2d 263), and certiorari was denied by the United States Supreme Court on October 8, 1951 (96 L. Ed., Adv. Op. 33). It is interesting to note that in the *Tucker* case plaintiff is referred to in the District Court as "Tucker" only (90 Fed. Supp. 290). In the Fifth Circuit plaintiff is referred to as "Tucker, *et al*" (188 F. 2d 263), but before the United States Supreme Court plaintiff is referred to as "Mrs. Adele V. Hubert Tucker, As a Stockholder, on Behalf of Crescent City Laundries, Inc., Petitioner" (96 L. Ed. Adv. Op. 33).

B.

The Corporation Is Not an Indispensable Party Plaintiff.

Throughout his opening brief appellant asserts that Standard is an indispensable party *plaintiff*. We concede that in a stockholder's derivative action the corporation is an indispensable party but this is a far cry from saying that it is an indispensable party *plaintiff*.

In *Venner v. Great Northern Railway Company* (1907), 209 U. S. 24, 28 S. Ct. 328, 52 L. Ed. 666, appellant, a citizen of New York, filed a minority stockholders derivative action against James J. Hill, a citizen of Minnesota, and the Great Northern Railway Company, a Minnesota corporation, for alleged wrongdoing by Hill. The defendant moved to transfer to the Federal Court for diversity and plaintiff moved to remand to the State court urging that the corporation was the only real plaintiff, that this therefore in essence was an action by a Minnesota corporation against a Minnesota citizen of which only the State court had jurisdiction. The trial court refused to remand. This was affirmed on appeal by the United States Supreme Court which court at page 668 said:

> "Let it be assumed for the purposes of this decision that the court may disregard the arrangement of parties made by the pleader, and align them upon the side where their interest in and attitude to the controversy really place them, and then may determine the jurisdictional question in view of this alignment. (Citations omitted.) If this rule should be applied it would leave the parties here where the

pleader has arranged them. It would doubtless be for the financial interests of the defendant railroad that the plaintiff should prevail. *But that is not enough.* Both defendants unite, as sufficiently appears by the petition and other proceedings, in resisting the plaintiff's claim of illegality and fraud. They are alleged to have engaged in the same illegal and fraudulent conduct, and the injury is alleged to have been accomplished by their joint action. The plaintiff's controversy is with both, and both are rightfully and necessarily made defendants, *and neither can, for jurisdictional purposes, be regarded otherwise than as a defendant.* (Citations omitted.) The case of Doctor v. Harrington is precisely in point on this branch of the case, and is conclusive. In that case the plaintiffs, stockholders in a corporation, brought an action in the circuit court against the corporation and Harrington, another stockholder, 'who directed the management of the affairs of the corporation, dictated its policy, and selected its directors.' It was alleged that Harrington fraudulently caused the corporation to make its promissory note without consideration, obtained a judgment on the note, and sold, on execution, for much less than their real value, the assets of the corporation to persons acting for his benefit. On the face of the pleadings there was the necessary diversity of citizenship, but it was insisted that the corporation, because its interests were the same as that of the plaintiff, should be regarded as a plaintiff. The court below so aligned the corporation defendant, and, as that destroyed the diversity of citizenship, dismissed the suit for want of jurisdiction. This court reversed the decree, saying, p. 587: *'The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to*

act in a way detrimental to his rights. In other words, his interests, and the interests of the corporation, may be made subservient to some illegal purpose. If a controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in a Federal court.' There was therefore in the case at bar the diversity of citizenship which confers jurisdiction." (Emphasis ours.)

C.

Plaintiff Donald C. Russell Is More Than a Mere Nominal Party.

In order to justify his assertion that the United States District Court has jurisdiction appellant asserts that plaintiff Donald C. Russell is a mere nominal party whose citizenship may be disregarded in determining jurisdiction. Appellant relies on two cases, *Overman Wheel Company v. Pope Manufacturing Company,* 46 Fed. 577, and *Sioux City & D. M. Ry. Co. v. Chicago M. & St. P. Ry. Co.,* 27 Fed. 770, neither of which appear to be minority stockholders derivative actions.

We think a case more in point which discloses that Donald C. Russell as a minority stockholder is more than a mere nominal party is the case of *Nogle v. Wyoga Gas & Oil Corporation,* 10 Fed. Supp. 905. In this case plaintiff minority stockholder brought a derivative action against defendant Delaware corporation and certain officers and directors who were citizens of Pennsylvania. The action was filed in the United States District Court, Middle District of Pennsylvania. Plaintiff was a citizen of Pennsylvania. Defendants moved to dismiss for want of jurisdiction. Plaintiff made the same contention as Donald C. Russell in the case at bar, to-wit: that plaintiff was a mere nominal party, the real cause of action

belonged to the Delaware corporation, that plaintiff's residence should conclusively be presumed to be the same as the corporation, and that therefore there was complete diversity. The District Court in dismissing the action for want of jurisdiction said at page 906:

> "The object of the presumption that the stockholders of a corporation are deemed to be citizens of the corporation's domicile is to establish the citizenship of the legal entity for the purpose of jurisdiction in the federal courts. *Such presumption has no relation to the citizenship of individuals as parties to a controversy in their own right. It follows that there is no legal presumption that the individual complainants, who are also stockholders of the defendant corporation, are citizens of the same state as the corporation.*
>
> *Doctor v. Harrington,* 196 U. S. 579, 25 S. Ct. 355, 49 L. Ed. 606;
>
> *Utah-Nevada Co. v. De Lamar* (C. C. A.), 133 F. 113, certiorari denied 199 U. S. 605, 26 S. Ct. 746, 50 L. Ed. 330.
>
> *"The defendant corporation cannot be aligned with the plaintiff, since it appears from the bill that those in control of the corporation are opposed to the object sought to be obtained by the complainants in their suit.* The 'fact that the ultimate interest of a corporate defendant may be the same as that of the complaining stockholders does not require, in arranging the parties to a cause, that such corporation be grouped on the side of the complainants, if it is under a control antagonistic to the complainants and is made to act in a way detrimental to their rights. * * *.' Hughes, Federal Practice, vol. 2, §747;

Kelly v. Mississippi River Coaling Co., *et al.* (C. C.), 175 F. 482; 28 U. S. C. A., §41(1), note 653.

"A federal court is presumed to be without jurisdiction of a suit until the contrary affirmatively appears. To give a federal court jurisdiction on the ground of diversity of citizenship, all parties on one side must be citizens of different states from all persons on the other side. Danks v. Gordon, *et al.* (C. C. A.), 272 F. 821; Osthaus v. Button, *et al.* (C. C. A.), 70 F. (2d) 392; 28 U. S. C. A., §41(1), note 598. The pleadings show that all the plaintiff stockholders and all the defendants except the corporation, R. E. Kearney, and George J. Hartman, are citizens of Pennsylvania." (Emphasis ours.)

In *Doctor v. Harrington* (1905), 196 U. S. 579, 25 S. Ct. 355, 49 L. Ed. 606, we have the converse of appellants argument. Plaintiff, a minority stockholder, citizen of New Jersey brought a derivative action against a New York corporation and individual citizens of New York in the United States Circuit Court, New York, on the basis of diversity of citizenship. Defendants moved to dismiss for lack of diversity asserting that the cause of action was really that of the corporation who should be regarded as plaintiff; hence no diversity. The trial court dismissed the United States Supreme Court reversed, saying at page 609:

"The ninety-fourth rule in equity contemplates that there may be, and provides for, a suit brought by a stockholder in a corporation, founded on rights which may properly be asserted by the corporation. And the decisions of this court establish that such a suit, when between citizens of different states, in-

volves a controversy cognizable in a circuit court of the United States. The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff; but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. In other words, his interests and the interests of the corporation may be made subservient to some illegal purpose. If a controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in a Federal court.

In Detroit v. Dean, 106 U. S. 537, 27 L. Ed. 300, 1 Sup. Ct. Rep. 500, Dean, who was a citizen of New York and a stockholder in the Mutual Gaslight Company, a Michigan corporation, in order to protect its right and property against the threatened action of a third party, brought suit against the latter and the corporation in the circuit court of the United States for the eastern district of Michigan. This court ordered the bill dismissed, not because Dean and the corporation had identical interests, but because the refusal of the directors of the corporation to sue was collusive. The right of a stockholder to sue a corporation for the protection of his rights was recognized, the condition only being the refusal of the directors to act, which refusal, it is said, must be real, not feigned. Hawes v. Oakland (Hawes v. Contra Costa Water Co.), 104 U. S. 450, 26 L. Ed. 827, was cited, where a like right was decided to exist. See also Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401; Davenport v. Dows, 18 Wall. 626, 21 L. Ed. 938; Memphis v. Dean, 8 Wall. 73, 19 L. Ed. 328; Greenwood v. Union Freight R. Co., 105 U. S. 16, 26 L. Ed. 963; Quincy v. Steel, 120 U. S. 241, 30 L. Ed. 624, 7 Sup. Ct. Rep. 520. *It was said that in Dodge v. Woolsey, that the*

refusal of the directors to sue caused them and Woodsey, who was a stockholder in a corporation of which directors, 'to occupy antagonistic ground in respect to the controversy, which their refusal to sue forced him to take in defense of his rights.'"

In *Groel v. United Electric Co.,* 132 Fed. 252 (cited with approval in *Venner v. Great Northern,* 209 U. S. 24, 28 Sup. Ct. 328, 52 L. Ed. 666), a New Jersey stockholder brought a minority stockholder's suit against his company, a New Jersey corporation, and a Pennsylvania corporation in the State Courts of New Jersey. The case was transferred to the Federal Court and on motion to remand the Pennsylvania corporation argued that the interest of the New Jersey corporation was identical with that of the New Jersey plaintiff, that the New Jersey corporation should be treated as a plaintiff for purpose of determining the existence of diversity, and since there was thus diversity, the motion to remand should be denied. After an exhaustive review of the authorities, the court granted the motion to remand, saying at page 263:

> "The rule deduced from them is that, in a suit in equity instituted by a stockholder in his own name, but upon a right of action existing in his corporation, *the stockholder's corporation will be aligned with the defendants whenever the officers or persons controlling the corporation are shown to be opposed to the object sought by the complaining stockholder,* and that, when such opposition does not appear, the stockholder's corporation will be aligned with the complainant in the suit."

Plaintiff Donald C. Russell's assertion that he is merely a nominal party plaintiff and the corporation is the real indispensable plaintiff proceeds on the assumption that all

that plaintiff says about alleged wrongdoing by the individual defendants is true but disregards his own allegations [Par. XVI, subd. c; Tr. p. 18] that

> "Standard is under the domination and control of Defendant Ruble Family through a dummy board of directors."

It is apparent from the complaint that the corporation is antagonistic to the claims of Donald C. Russell and the corporation should therefore be aligned as a defendant. The corporation Standard might very properly elect not to sue.

Findley v. Garrett, 109 Cal. App. 2d 166, 240 P. 2d 421.

VII.

Motion to Dismiss Appeal on Behalf of Standard.

The complaint in the trial court was filed in the name of Donald C. Russell and Standard without the knowledge, authorization or consent of Standard. A motion by Standard to dismiss and withdraw its name as plaintiff was not determined by the trial court since it deemed the question moot by reason of its judgment dismissing the action for want of jurisdiction. The appeal herein before this Honorable Court was likewise taken in the name of Standard, without its knowledge, authorization or consent. As soon as this appeal is set down for oral argument, Standard will duly make a motion on that date supported by certified resolution of its Board of Directors to dismiss the appeal in so far as Standard is concerned. We deem it appropriate to now call the

court's attention to the intentions of Standard in this regard because, if, as and when such motion is granted it will make crystal clear the absurd position which Donald C. Russell finds himself in. It will demonstrate that Donald C. Russell is more than a mere nominal party, he is the entire lawsuit. He is as essential to this lawsuit as a shoelace is to a shoe or a belt is to a pair of pants. Without him there would be no lawsuit. If the purported appeal is dismissed on behalf of Standard, the judgment of the trial court dismissing the action as to Standard will be final. There will thus be only one party plaintiff, to-wit, Donald C. Russell, who is a resident of California, the same as all other defendants except Associated.

Conclusion.

It is respectfully submitted that the judgment of the trial court dismissing the complaint for want of jurisdiction should be affirmed.

Respectfully submitted,

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